

**5548. Alleged misbranding of "Bell-ans." U. S. v. Bell & Co., a corporation. Tried to the court and a jury. Verdict of not guilty. (F. & D. No. 7475. I. S. No. 515-k.)**

On August 10, 1916, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Bell & Co., a corporation, Orangeburg, N. Y., alleging shipment by said company, in violation of the Food and Drugs Act, as amended, on September 21, 1914, from the State of New York into the State of Maryland, of a quantity of an article, labeled in part, "Bell-ans," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Charcoal (per cent).....	6.31
Sodium carbonate (per cent).....	11.17
Sodium bicarbonate (per cent).....	77.34
Methyl salicylate: Present.	
Papain: Present.	
Ginger: Present.	
Saccharin: Present.	

It was alleged in substance in the information that the article was misbranded for the reason that certain statements appearing on the labels of the bottle and carton and certain statements included in the circular or pamphlet accompanying the article falsely and fraudulently represented it as effective in the treatment of and for relieving vomiting in pregnancy, cholera morbus, alcoholism, and seasickness; in the treatment of indigestion, vertigo, peritonitis, and dyspepsia; for digesting every variety of food, removing every symptom of indigestion and restoring the entire digestive tract to normal condition; as a treatment for biliousness, sick headache, colic, and cramps; and as a remedy for every derangement of the digestive organs, when, in truth and in fact, it was not.

On February 5, 1917, the defendant company entered a plea of not guilty to the information. On April 9, 1917, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Cushman, D. J.):

Gentlemen of the jury, as indicated by the arguments of the attorneys, the issue has been fairly stated by both counsel. This indictment, or rather information, charges the defendant with having on a certain day in 1914 shipped in interstate commerce from New York to Baltimore certain articles, described in the information, in a package containing labels and circulars, which contained statements regarding the effect as a medicine of the contents of the package.

The information charges that these statements on the labels and in the circulars were false and fraudulent; that they were known by the company that put them out and made this shipment to be false and fraudulent; that they were made in such reckless disregard of the truth that it could not be said that they honestly believed them to be true. Hence they were fraudulent.

To this information the defendant has entered a plea of not guilty, which places the burden upon the Government of establishing every material allegation of the information by evidence sufficient to convince you beyond a reasonable doubt of the guilt of the defendant before you can return a verdict of guilty.

In that connection, I instruct you that it is not necessary that the Government, in order to warrant you in returning a verdict of guilty, should have proven that every one of the representations on these labels and in these circulars were false and fraudulent regarding the curative or therapeutic effect of these medicines—of this article of medicine—but before you could return a verdict of guilty it would be necessary that the Government should have established by evidence sufficient to satisfy you beyond a reasonable doubt that at least one of the statements regarding the curative or therapeutic effect of this medicine—I can not remember the name of it—was false and fraudulent.

This law, in substance, forbids anyone to send in interstate commerce misbranded articles of medicine. Then it defines an article as misbranded if the label or circular contains any statement regarding the curative or therapeutic effect of such article which is false and fraudulent. And then it prohibits anybody doing the like of that, and if they do do it they are to be punished.

Now, the issue has been narrowed very materially and counsel in their argument have conceded it. It comes to this: Is any one of the statements on this label or in this circular concerning the curative or therapeutic effect of this medicine false and fraudulent? The first thing when you retire to consider on your verdict would be to take up logically whether any one of these statements was false. If you conclude that there was not evidence sufficient to convince you beyond a reasonable doubt that any one of these statements was false, your verdict would be not guilty; but if you should find that some of these statements were false and untrue then the next step that you would have to undertake would be to determine whether the defendant in putting out these circulars and labels with those statements on them did so fraudulently. That is, whether it knew them to be false. If you find that it honestly believed from reports of doctors and patients that had taken this medicine and had good reason to believe that all these representations were reasonably accurate and true, then it would not be fraudulent, because you could not say that defendant knew them to be false.

I consider it necessary to give you a general idea of what the word fraudulent means in that connection. A fraudulent representation must contain the following elements: First, it must be false; second, the person who makes it must know it to be false; third, he must make it to some one with an idea that that some one will believe it and act in the belief that it is true; and, lastly, it must be made under such circumstances as might lead an ordinary person to believe it was true.

And if he did believe it was true, and acting in that belief, he parted with his money, he would be cheated out of it, because it was not so.

All those things enter into a fraudulent representation.

Take this representation set out in the indictment, or information, just take a single one to illustrate, but the same rule applies to all these statements regarding the curative or therapeutic effect of this article of medicine—that is, it is stated in there that it relieves vomiting in pregnancy. Now, taking that statement alone, before you could find the defendants guilty concerning that statement you would have to find that that statement was false; you would have to find that the defendant did not believe it to be true; that the defendant either knew it was false or made it with such reckless and wanton disregard, regarding its truth, as to amount to the same thing. And you would have to find that it was made by the defendant with the idea that people would buy the medicine in the belief that it would relieve vomiting in pregnancy; and that it was made under such conditions as to induce ordinary persons to buy it in that belief.

Many of the things charged here are admitted. That is, the defense admits that it shipped the parcel. They admit that these labels were used, and they admit, of course, that the labels were put on there to induce the buying public to buy the medicine in the belief that it would do the work as it is described as doing in the labels and circulars. So you come back to the sole question in the case for you to determine, which is, whether those statements are true or whether they are false, and if false, whether the defendant made them, knowing they were false, or with such reckless disregard of the truth as to amount to the same thing.

I will read you certain instructions that I think I have covered already in substance in what I have already told you, but to be sure that the ground is covered, these have been prepared by counsel for the defense, and I will read them that I may see that his client is protected in its rights.

“As the offense charged here is a misdemeanor, the Government must satisfy you of the defendant's guilt beyond a reasonable doubt and if it fails in that respect, you must acquit the defendant.

“The first question of fact for the jury to determine on the evidence of this case is whether the statements made by the defendant in its circular and label as to the therapeutic or curative effects of its tablet are false. If you are not convinced that such statements are false, you must acquit.

“If you find these statements are false, then the other and remaining question is whether such statements were made fraudulently, for the crime is not established by merely showing that the statements are untrue. They must have been made fraudulently as well as untruthfully.

"The question as to whether these statements were fraudulently made involves a state of mind, the defendant's state of mind when it, through its agents, issued these statements. In other words, were these statements made with the knowledge that they were untrue and with the intention to deceive? What is actually in the mind of the defendant is a question of fact for your determination from all the evidence in the case.

"The officers of the defendant corporation, as the owner of this alleged remedy, had a perfect right to state their views regarding the merits and effectiveness of the tablets, and if these statements brought into issue here were made honestly in the belief that they were true they are not fraudulent within the meaning of the act.

"In determining as to whether the defendant's use of the words contained in the challenged statements was false and fraudulent, the jury have the right to consider the ideas conveyed by such words in their common usage to the average person as distinguished from the ideas conveyed to the average physician or scientist.

"The court's denial of the motion made by the defendant's counsel for a direction of a verdict in its behalf in no way indicates any opinion of the court upon the subject of the defendant's guilt and the views of the court as to the merits of the case. The significance of the denial is that there were questions of fact in the case which should be submitted to the jury."

There is no presumption arises against the defendant by reason of the fact that it has been indicted and brought to trial before you, but every presumption of law is in favor of the defendant's innocence. This presumption continues throughout the trial with the defendant; and until the Government has produced evidence sufficient to overcome this presumption and satisfy you beyond a reasonable doubt, and prove every material allegation of the indictment, or, in this case, the information, by evidence which satisfies you beyond a reasonable doubt of the guilt of the defendant.

If you have a reasonable doubt concerning any material allegation in the indictment, it will be your duty to acquit.

Reasonable doubt as used in these instructions is just what the two words joined together mean. That is, a doubt based on reason; a doubt for which you can give a reason. It does not mean every possible doubt. Nothing in this world, scarcely, can be established beyond all questions of mistake, but it does require, before you can return a verdict of guilty, that the guilt of the defendant must be shown by more than a mere preponderance of the evidence. That requirement of the law is that it should be established by evidence sufficient to satisfy you beyond a reasonable doubt. Reasonable doubt has been defined to be such a doubt as a man of ordinary firmness would allow to cause him to hesitate in the more important transactions concerning his own affairs.

You are in this case, as in every case where questions of fact are submitted to the jury, the sole and exclusive judge of every question of fact in the case, and of the weight of the evidence and the credibility of the witness.

In weighing the evidence and making up your minds as to the amount of credit which should be given to the various witnesses, you should take into account their appearance upon the stand, whether they appeared to you to be credible, whether they have inspired your confidence by their appearance. You should take into consideration their manner and demeanor in giving this testimony, whether it was such as to inspire your confidence or to repel it; whether it appeared to you that the witness was trying to tell you all that he knew about the case, neither holding back nor volunteering anything, or whether it appeared to you that he was reluctant and evasive and holding back what he knew or claimed to know until it was dragged out of him. On the other hand, whether he impressed you as being too willing and anxious to volunteer matters which no one inquired about. Also, you will take into account the testimony of each witness, whether it appeared to be reasonable and probable; whether it appeared to be complete in detail as you would expect it to be under the circumstances, or whether it had holes in it; whether it is corroborated by other evidence in the case where you would expect it to be corroborated if it were true; whether it is contradicted by other evidence in the case. You will also take into account the interest each witness has in the issues presented in the case, either by his manner or his relation to the case.

Thereupon the jury retired on April 10, 1917, and after due deliberation returned a verdict of not guilty on April 11, 1917, and judgment was entered accordingly.